KOPERASI MAHADAYA BHD

v.

KOPERASI POLIS DIRAJA MALAYSIA BHD & ANOR AND ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
LOW HOP BING JCA
ABU SAMAH NORDIN JCA
AZAHAR MOHAMED J
[CIVIL APPEAL NOS: W-02-2653-2009 & W-02-2677-2009]
14 DECEMBER 2011

CONTRACT: *Sale and purchase agreement - Deposit - Forfeiture - Contract for sale of land at RM1.4m - RM1m paid as 'deposit and part payment' of purchase price - Vendor allowed to forfeit RM500,000 if buyer failed to pay balance purchase price - Whether RM500,000 true deposit - Whether figure should be 10% of purchase price - Contract frustrated and impossible to perform - Whether monies paid before frustration recoverable - Fraudulent transfer by purchaser before balance purchase price paid - Whether title liable to be set aside - National Land Code 1965, s. 340 - Civil Law Act 1956, s. 15(1) and (2) - Contracts Act 1950, s. 75*

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Koperasi Polis DiRaja Malaysia Berhad ('KPDRM') owned three parcels of land (collectively 'the land') in Terengganu. By a sale and purchase agreement ('SPA'), it agreed to sell the land to Koperasi Mahadaya Berhad ('Mahadaya') for RM1.4m. Under the SPA, Mahadaya paid KPDRM RM1m as "deposit and part payment" towards the purchase price. The balance was to be paid to KPDRM's solicitors as stakeholders within one month or such extended period as agreed by KPDRM, subject to payment of interest. The SPA provided that if Mahadaya failed to pay the balance purchase price within the stipulated time, KPDRM was

entitled to, *inter alia*, forfeit RM500,000 from the RM1m as agreed damages. In the meantime, Mahadaya entered into a Joint-Venture Agreement ('JVA') and Supplemental Agreement ('SA') with Reinco Properties Sdn Bhd ('Reinco') to develop the land into a housing estate. Reinco was to fully finance Mahadaya's purchase of the land from KPDRM. Pursuant to the JVA and SA, Reinco paid Mahadaya, *inter alia*, RM1.8m. Due to differences between the parties, Mahadaya terminated the JVA and SA. Meanwhile, pursuant to the SPA, KPDRM's solicitors forwarded the original titles to the land and the transfer documents to Mahadaya's SPA solicitors who, in turn, forwarded them to Mahadaya's solicitors handling the loan transaction. At Mahadaya's request, KPDRM granted an extension of time for the balance purchase price to be settled with interest on or before 20 March 2001. When Mahadaya failed to comply with the deadline, KPDRM notified Mahadaya's SPA solicitors that it was terminating the SPA and forfeiting RM500,000 of the deposit and asked for the return of the original titles. Mahadaya's SPA solicitors, in turn, requested the loan solicitors to return the titles but no reply ever came. A search revealed the titles were registered in Mahadaya's name in February 2001, well before the deadline given to it to settle the balance purchase price. In its suit in the High Court against Mahadaya, Reinco and the Registrar of Titles, Terengganu, KPDRM obtained, *inter alia*, a declaration that it was entitled to forfeit RM200,000 of the deposit and that the transfers of the land were null and void. Mahadaya's counterclaim, which included a prayer for specific performance of the SPA, was dismissed. In its suit against Mahadaya and KPDRM, Reinco, which claimed beneficial ownership of the land for having paid RM1.8m to Mahadaya, succeeded only on its claim for liquidated damages of RM800,000 with interest. All its other prayers were dismissed. Against the respective decisions, Mahadaya and Reinco appealed to the Court of Appeal.

Held (unanimously allowing Mahadaya's appeal in part and Reinco's appeal to an extent; affirming all other orders of the High Court)
Per Low Hop Bing JCA:

(1) The transfer of the land to Mahadaya had first to be supported by its performance of the fundamental obligation to pay the balance purchase price on or before the agreed

extension of one month. But Mahadaya failed to do so and occasioned a breach of fundamental term going to the root of the SPA. KPDRM rightfully exercised its right to terminate the SPA and such termination was valid. (para 41)

(2) Mahadaya's purported transfer of the land to itself in the face of non-payment of the balance sum was wilful and fraudulent and intended to deprive and cheat KPDRM of its existing right of ownership. Mahadaya's title having been tainted with fraud was not indefeasible and was liable to be set aside under s. 340(3)(a) of the National Land Code. As Mahadaya had not acquired the title as a purchaser in good faith and for valuable consideration, the proviso in s. 340(3) was inapplicable. (paras 47, 52 & 53)

(3) The sum of RM500,000 forfeited by KPDRM was not a true deposit. The true deposit was 10% of the purchase price. That 10% was RM140,000, which should be the forfeiture sum, and not RM200,000 as ordered by the trial judge. (para 65)

(4) KPDRM was not a party to the JVA and SA and there was no privity of contract. No damages could be ordered against KPDRM in this regard. (para 68)

(5) As the JVA and SA became impossible of performance or had otherwise been frustrated, s. 15(1) of the Civil Law Act 1956 discharged Mahadaya and Reinco from further performance of the JVA and SA. Under s. 15(2), Reinco was entitled to recover the RM1.8m received by Mahadaya for the use of Reinco by whom the money was paid. Instead of the RM800,000 awarded by the High Court, Reinco was entitled to recover RM1.8m. (para 69)

Bahasa Malaysia *Translation Of Headnotes*

Koperasi Polis Diraja Malaysia Berhad ('KPDRM') memiliki tiga bidang tanah ('tanah') di Terengganu. Melalui satu perjanjian jual beli ('PJB'), ia bersetuju untuk menjual tanah kepada Koperasi Mahadaya Berhad ('Mahadaya') untuk RM1.4 juta. Di bawah PJB, Mahadaya membayar KPDRM RM1 juta sebagai "deposit dan pembayaran sebahagian" ke arah harga belian. Bakinya akan dibayar kepada peguamcara-peguamcara KPDRM sebagai pemegang-pemegang amanah dalam tempoh satu bulan atau apa-

A apa tempoh lanjutan yang dipersetujui oleh KPDRM, tertakluk kepada pembayaran faedah. PJB telah memperuntukkan bahawa jika Mahadaya gagal membayar baki harga pembelian dalam masa yang ditetapkan, KPDRM berhak untuk, antara lain, merampas RM500,000 dari RM1 juta sebagai gantirugi yang dipersetujui. B Sementara itu, Mahadaya memasuki Perjanjian Usahasama ('PJU') dan Perjanjian Tambahan ('PT') dengan Reinco Properties Sdn Bhd ('Reinco') untuk membangunkan tanah ke sebuah kawasan perumahan. Reinco sepatutnya membiayai sepenuhnya pembelian tanah itu oleh Mahadaya dari KPDRM. Di bawah PJU dan PT, C Reinco membayar Mahadaya, antara lain, RM1.8 juta. Disebabkan perbezaan di antara pihak-pihak, Mahadaya telah membatalkan PJU dan PT. Sementara itu, di bawah PJB, peguamcara-peguamcara KPDRM menghantar suratan hakmilik asal tanah dan dokumen-dokumen pemindahan ke peguamcara-peguamcara PJB Mahadaya, D yang seterusnya telah menghantarnya ke peguamcara-peguamcara Mahadaya yang mengendali transaksi pinjaman. Atas permintaan Mahadaya, KPDRM memberi lanjutan masa untuk baki harga pembelian diselesaikan dengan faedah pada atau sebelum 20 Mac 2001. Apabila Mahadaya gagal mematuhi tarikh akhir, KPDRM E memberitahu peguamcara-peguamcara PJB Mahadaya yang ia akan membatalkan PJB dan merampas RM500,000 dari deposit dan meminta pulangan suratan-suratan hak milik asal. Peguamcara-peguamcara PJB Mahadaya pula telah meminta peguamcara-peguamcara pinjaman untuk mengembalikan suratan-suratan hak F milik asal tersebut tetapi tiada jawapan diberi. Satu carian menunjukkan bahawa hakmilik-hakmilik telah didaftarkan di bawah nama Mahadaya pada Februari 2001, sebelum tarikh akhir yang telah diberikan untuk menyelesaikan baki harga pembelian. Dalam guamannya di Mahkamah Tinggi terhadap Mahadaya, Reinco dan G Pendaftar Hakmilik, Terengganu, KPDRM telah memperolehi, antara lain, satu perisytiharan bahawa ia berhak merampas RM200,000 dari deposit dan pindahmilik-pindahmilik tanah adalah tidak sah dan terbatal. Tuntutan balas Mahadaya, yang termasuk satu permohonan pelaksanaan spesifik PJB, ditolak. Dalam H guamannya terhadap Mahadaya dan KPDRM, Reinco, yang menuntut hakmilik benefisial tanah kerana telah membayar RM1.8 juta, hanya berjaya dalam tuntutannya untuk gantirugi yang ditentukan RM800,000 dengan faedah. Tuntutan-tuntutannya yang lain telah ditolak. Terhadap keputusan-keputusan masing-masing, I Mahadaya dan Reinco merayu ke Mahkamah Rayuan.

Diputuskan (sebulat suara membenarkan sebahagian rayuan Mahadaya dan rayuan Reinco setakat tertentu; mengesahkan perintah-perintah lain Mahkamah Tinggi)
Oleh Low Hop Bing HMR:

(1) Pindahmilik tanah ke Mahadaya terlebih dahulu mesti disokong oleh pelaksanaan kewajipan asas untuk membayar baki harga belian pada atau sebelum tempoh lanjutan sebulan yang telah dipersetujui. Tetapi Mahadaya gagal untuk berbuat demikian dan menyebabkan pelanggaran terma asas yang pergi ke akar PJB. KPDRM telah melaksanakan haknya untuk membatal PJB dan pembatalan tersebut adalah sah.

(2) Pindahmilik tanah oleh Mahadaya kepada dirinya sendiri berhadapan dengan kegagalan membayar baki harga adalah dengan secara sengaja dan palsu dan dicadangkan untuk menghalang dan menipu KPDRM mengenai hak pemilikannya. Hakmilik Mahadaya yang telah dicemarkan dengan penipuan tidak menjadi tak boleh disangkal dan harus diketepikan di bawah s. 340(3)(a) Kanun Tanah Negara. Oleh kerana Mahadaya tidak memperoleh hakmilik sebagai pembeli suci hati dengan balasan bernilai, proviso s. 340(3) tidak digunapakai.

(3) Amaun RM500,000 yang dirampas oleh KPDRM bukan deposit yang betul. Deposit yang betul adalah 10% dari harga pembelian. 10% itu adalah RM140,000, yang sepatutnya menjadi amaun perampasan, dan bukan RM200,000 seperti yang diperintah hakim bicara.

(4) KPDRM bukan pihak kepada PJU dan PT dan tidak terdapat priviti kontrak. Tiada gantirugi boleh diperintahkan terhadap KPDRM dalam hal ini.

(5) Oleh kerana PJU dan PT mustahil dilaksanakan atau telah dikecewakan, s. 15(1) Akta Undang-Undang Sivil 1956 melepaskan Mahadaya dan Reinco dari meneruskan perlaksanaan PJU dan PT. Di bawah s. 15(2), Reinco berhak untuk mendapatkan kembali RM1.8 juta yang diterima oleh Mahadaya untuk kegunaan Reinco yang olehnya wang itu dibayar. Daripada RM800,000 yang telah diawardkan oleh Mahkamah Tinggi, Reinco berhak untuk mendapatkan balik RM1.8 juta.

Case(s) referred to:

Aik Ming (M) Sdn Bhd & 8 Ors v. Chang Ching Chuen & 3 Ors & Another Case [1995] 3 CLJ 639 CA ***(refd)***

Datuk Jagindar Singh & Ors v. Tara Rajaratnam [1983] 1 LNS 21 FC ***(refd)***

Doshi v. Yeoh Tiong Lay [1974] 1 LNS 30 FC ***(refd)***

Ex Parte Barrell L.R 10 Ch 512 ***(refd)***

Green v. Nixon [1857] 23 Beav 530 ***(refd)***

Hadley v. Baxendale [1854] 9 Exch 341 ***(refd)***

Howe v. Smith [1884] 27 Ch D 89 ***(refd)***

Johor Coastal Development Sdn Bhd v. Constrajaya Sdn Bhd [2009] 4 CLJ 569 FC ***(refd)***

Linggi Plantations Ltd v. Jagatheesan [1971] 1 LNS 66 PC ***(refd)***

M & J Frozen Food Sdn Bhd & Anor v. Siland Sdn Bhd & Anor [1994] 2 CLJ 14 SC ***(refd)***

Morland v. Hales and Somerville [1911] 30 NZLR 201 ***(refd)***

P.J.T.V. Denson (M) Sdn Bhd & Ors v. Roxy (Malaysia) Sdn Bhd [1980] 1 LNS 55 FC ***(refd)***

Seah Siang Mong v. Ong Ban Chai & Another Case [1998] 1 CLJ Supp 295 HC ***(refd)***

Selva Kumar Murugiah v. Thiagarajah Retnasamy [1995] 2 CLJ 374 FC ***(refd)***

Soper v. Arnold [1889] 14 App Case 429 ***(refd)***

Sun Properties Sdn Bhd & Ors v. Happy Shopping Plaza Sdn Bhd [1987] 2 CLJ 423; [1987] CLJ (Rep) 345 SC ***(refd)***

Waimiha Sawmilling Co Ltd v. Waione Timber Co Ltd [1926] AC 101 ***(refd)***

Wong Leng Hung v. Krishnamurty Nagaratnam [2005] 8 CLJ 745 HC ***(refd)***

Legislation referred to:

Contracts Act 1950, s. 75

National Land Code, s. 340(1), (2)(a), (3)(a)

For the appellant - James Culaz; M/s Culaz & Assocs

For the 1st respondents - Nordin Sulaiman (Nurul Suhada with him); M/s Ghazi & Lim

For the 2nd respondent - Douglas Yee (Lee Kwee Yock with him); M/s Douglas Yee

[Appeal from High Court, Kuala Lumpur; Suit Nos: S2(S5)-21-182-2001 & S3-22-1150-2001]

[Editor's note: For the High Court judgment, please see Koperasi Polis Diraja Malaysia Bhd v. Koperasi Mahadaya Bhd & Ors & Another Appeal [2010] 1 LNS 451.]

Reported by Ashok Kumar

JUDGMENT

Low Hop Bing JCA:

Introduction

[1] These two relatively complex appeals arose from two consolidated suits in the Kuala Lumpur High Court *viz* Civil Suit S2-(S5)-21-182-2001 ("Civil Suit S2") and Civil Suit S3-22-1150-2001 ("Civil Suit S3"). They involve substantially the same parties, and the same properties *viz* three parcels of agricultural land held under Geran No. 9743 Lot 2675, Geran No. 9744 Lot 2676; and Geran No. 9745 Lot 2677, in the mukim of Kertih, district of Kemaman, Terengganu (collectively "the land").

[2] In Civil Suit S2, the plaintiff is Koperasi Polis DiRaja Malaysia Bhd ("KPDRM"). After a full trial, as against the first defendant Koperasi Mahadaya Berhad ("Mahadaya"), the High Court made the following orders:

(1) Declaration:

(a) that the sale and purchase agreement executed between KPDRM and Mahadaya on 21 December 2000 ("SPA1") is terminated, null and void;

(b) that KPDRM is entitled to forfeit RM200,000 from the deposit and part payment of RM1 million;

(c) that KPDRM is at all times the rightful owner of the land;

(d) that any dealing by any party using SPA1, Transfer Form and Title Deeds (collectively "the Transfer Documents") after the date of SPA1 is null and void;

(e) that all entries of transfers of title and memorial effected by any party using the Transfer Documents after the date of SPA1 are null and void;

(2) Injunction:

(a) that Mahadaya re-transfer the Land to KPDRM;

(b) that Mahadaya return the Transfer Documents to KPDRM within 14 days of service of this order;

(c) restraining Mahadaya from using the Transfer Documents to deal with any person whatsoever;

(3) An order that Mahadaya deliver vacant possession of the land to KPDRM; and

(4) Costs.

[3] Meanwhile, the High Court dismissed Mahadaya's counterclaim for:

(1) A declaration that Mahadaya is the rightful registered owner of the land;

(2) An injunction restraining KPDRM from interfering with the affairs, management and administration of Mahadaya;

(3) Specific performance of SPA1;

(4) General damages; and

(5) Costs.

[4] As against the second defendant, Reinco Properties Sdn Bhd ("Reinco"), KPDRM obtained the following orders:

(1) Declaration:

(a) that the sale and purchase agreement executed between Mahadaya and Reinco ("SPA2") is null and void;

(b) that KPDRM is at all material times the rightful owner of the Land;

(c) that any dealing by any party using the Transfer Documents after the date of SPA2 is null and void;

(d) that all entries of transfers of title and memorial by any party after the date of SPA2 is null and void;

(2) Injunction:

(a) that Reinco return forthwith the Transfer Documents to KPDRM;

(b) restraining Reinco from dealing with any person by using the Transfer Documents and SPA2;

(3) An order that Reinco deliver vacant possession of the land to KPDRM; and

(4) Costs.

[5] Civil Suit S3 was filed by Reinco against Mahadaya and KPDRM, based on the joint venture agreement ("the JVA") and Supplemental Agreement ("the SA") entered into between Mahadaya and Reinco. Reinco claims, *inter alia*, beneficial ownership of the land on the ground that, pursuant to the JVA, it had provided RM1.8 million to Mahadaya to purchase the land. In addition, Reinco sought the following reliefs:

(1) Declaration:

(a) that KPDRM's purported termination of SPA1 is null and void;

(b) that KPDRM's remedy is in personam against Mahadaya, or Mahadaya's solicitors who gave their undertakings, for the balance purchase price;

(c) that by its letter dated 1 June 2001, Mahadaya was in default by not performing the JVA and the SA, but purporting to terminate the same;

(2) A vesting order pursuant to cl. 2 of the SA to vest the Land from Mahadaya to Reinco; and a further order directing the Registrar of Titles Terengganu to give effect to the prayer herein;

(3) Damages for breach of contract to be assessed by the Senior Assistant Registrar;

(4) Liquidated damages in the sum of RM800,000 with interest at 8% p.a. from 21 December 2000 to the date of full realization; and

(5) Costs in Civil Suit S2 and Civil Suit S3 to be paid by Mahadaya to Reinco.

[6] As against Mahadaya and KPDRM, the High Court allowed Reinco's claim for liquidated damages of RM800,000 with interest at 8% p.a. from 21 December 2000 to the date of full realisation, and costs to be taxed. However, Reinco's other prayers were dismissed.

[7] Mahadaya and Reinco have, *vide* these Appeals *viz.* No. W-02-2653-2009 and W-02-2677-2009, respectively appealed against the aforesaid orders.

A **Salient Facts In Civil Suit S2**

[8] KPDRM was the original owner of the land.

[9] By letter dated 25 April 2000, KPDRM accepted Mahadaya's offer *vide* letter dated 5 May 2000 to buy the land for RM1.8 million. On 20 May 2000, KPDRM's solicitors forwarded a draft sale and purchase agreement to Mahadaya. However, the parties did not sign the draft agreement.

[10] On 4 December 2000, for some unknown reasons, Mahadaya passed a resolution to purchase the land from KPDRM at a reduced consideration of RM1.4 million, which was the purchase price set out in SPA1. (A reference hereinafter to a clause is a reference to that clause in SPA1, unless otherwise stated).

[11] Upon execution of SPA1, pursuant to cl. 2(b), Mahadaya paid KPDRM RM1 million as "deposit and part payment". The balance of RM400,000 ("the balance") was to be paid to KPDRM's solicitors as stakeholders within one month or such extended period as may be agreed by KPDRM, subject to the payment of interest at the rate of 12% p.a. on the balance. Clause 20 provides for time to be of the essence of SPA1.

[12] Under cl. 4(d), if Mahadaya was using its own fund to purchase the land, Mahadaya's solicitors were authorized to effect the transfer of the Land to Mahadaya upon receipt by KPDRM's solicitors of the balance.

[13] On the other hand, cl. 4(e) stipulates that if Mahadaya was obtaining a loan to finance the purchase, then KPDRM was to deposit the Transfer Documents with Mahadaya's solicitors who were required to retain them in safe custody until Mahadaya's financier had provided a guarantee or an undertaking to release the loan.

[14] Clause 5 provides that in the event Mahadaya failed to pay the balance within the specified time or extended period (KPDRM has agreed to an extension of one month), then:

(1) KPDRM is at liberty to forfeit, as agreed damages, RM500,000 ie, 50%of the sum of RM1 million paid, and the balance shall be returned to Mahadaya without interest;

(2) Mahadaya or its solicitors shall return the Transfer Documents to KPDRM's solicitors;

(3) Mahadaya shall also deliver vacant possession of the land to KPDRM;

(4) Mahadaya shall bear all costs and expenses, if any, incurred by KPDRM; and

(5) SPA1 shall then be terminated and rendered null and void and the parties shall have no claim whatsoever thereunder.

[15] On 4 January 2001, pursuant to SPA1, KPDRM's solicitors forwarded two original titles *viz* for Lots 2676 and 2677 to Mahadaya's solicitors M/s Sabri, Nazli, Lana & Azizan ("Mahadaya's SPA solicitors").

[16] By letter dated 17 January 2001, Mahadaya's SPA solicitors requested KPDRM's solicitors to forward the Transfer Documents in order to transfer the land to Mahadaya.

[17] On 1 February 2001, M/s K Mano & Associates, Mahadaya's solicitors for loan documentation ("Mahadaya's loan solicitors") forwarded Mahadaya's cheque (post-dated 10 March 2001) to KPDRM and requested for the original titles to the land.

[18] By letter dated 5 February 2001, KPDRM's solicitors forwarded the original title for the third piece of land, ie, Lot 2675, to Mahadaya's SPA solicitors.

[19] However, subsequently, Mahadaya's loan solicitors informed KPDRM that:

(1) The balance would only be released ten days after their banker's meeting on 27 February 2001; and

(2) The bank was not able to approve the facilities at their meeting on 22 January 2001 because the loan documents were not in order.

[20] At Mahadaya's request, KPDRM agreed to extend to 20 March 2001 for payment of the balance with interest at 12% p.a, to be made on or before 20 March 2001.

[21] By letters dated 21 February 2001 and 22 February 2001, KPDRM's solicitors notified Mahadaya's SPA solicitors that pending payment of the balance together with interest, Mahadaya's SPA solicitors shall hold the Transfer Documents as stakeholders and not to present them for registration until all payments have been made.

[22] *Vide* letter dated 4 April 2001, KPDRM's solicitors notified Mahadaya's SPA solicitors that:

(1) The aforesaid post-dated cheque could not be encashed because Mahadaya had closed its account; and

(2) KPDRM had exercised its right, terminated SPA1 and forfeited 50% of the deposit under cl. 5, and the balance of the deposit would be returned within 14 days from the date of the receipt by KPDRM's solicitors of the Transfer Documents. A copy of the letter of termination was forwarded to Mahadaya.

[23] Earlier, *vide* letter dated 12 January 2001, Mahadaya's loan solicitors requested Mahadaya's SPA solicitors to return the original titles, held by Mahadaya's SPA solicitors, on Mahadaya's loan solicitors' undertaking that the balance would be paid to Mahadaya's SPA solicitors within 30 days of the transfer of the Land to Mahadaya and the registration of the charge in favour of the bank.

[24] Upon receiving KPDRM's letter of termination, Mahadaya's SPA solicitors requested on 11 April 2001 for the return of the original titles which they had given to Mahadaya's loan solicitors.

[25] On 13 April 2001, Mahadaya wrote to KPDRM's solicitors, apologised for the delay and asked for KPDRM's forbearance while they sorted out certain matters. However, KPDRM's solicitors sent a letter dated 25 April 2001 to Mahadaya's SPA solicitors reminding them of their delay in returning the titles and KPDRM's apprehension regarding the transaction.

[26] On 18 May 2001, Mahadaya's SPA solicitors wrote to KPDRM's solicitors informing them that there had been no response so far from Mahadaya's loan solicitors. KPDRM's solicitors did not receive the titles. A search revealed that on 19 February 2001, the titles were registered in Mahadaya's name.

Salient Facts In Civil Suit S3

[27] In April 2000, Mahadaya informed Reinco of Mahadaya's offer to purchase the land from KPDRM at RM1.8 million, and KPDRM had agreed. Mahadaya then negotiated with Reinco to develop the land into a housing estate.

[28] In early December 2000, Mahadaya informed Reinco that it would be buying the land. As stated earlier, for some unknown reasons, Mahadaya passed a resolution on 4 December 2000 to purchase the land from KPDRM at a reduced consideration of RM1.4 million.

[29] Mahadaya and Reinco then entered into the JVA and the SA to develop the land into a housing estate ("the project"). Reinco was to fully finance the purchase price payable by Mahadaya to KPDRM under SPA1. Reinco was also to pay Mahadaya RM15 million from the proceeds of sale of the units in the project, *in lieu* of 20% of the units built in the project.

[30] Pursuant to the JVA and the SA, Mahadaya executed and deposited with Reinco's solicitors an irrevocable Power of Attorney and a valid and registrable Memorandum of Transfer in favour of Reinco. Reinco then released RM1.8 million to Mahadaya. Mahadaya acknowledged receipt thereof. On 22 February 2001, Reinco lodged a caveat on the land.

[31] On 7 March 2001, Mahadaya gave notice to re-purchase the land from Reinco, but Reinco rejected it.

[32] On 8 March 2001, Reinco gave notice to Mahadaya that Mahadaya had breached the JVA, the SA and various undertakings.

[33] On 9 March 2001, Mahadaya delivered the titles to Reinco. On 30 May 2001, Mahadaya demanded payment and unspecified guarantee from Reinco within 24 hours, failing which Mahadaya would forward RM1.8 million to Reinco for release of the titles.

[34] On 1 June 2001, Mahadaya purportedly terminated the JVA and the SA on alleged grounds of Reinco's failure to pay RM1.2 million to Mahadaya under the SA.

A **Was SPA1 Validly Terminated?**

[35] Learned counsel Mr James Culaz submitted for Mahadaya that KPDRM's purported termination of SPA1 is invalid and the Land had been rightfully transferred to Mahadaya whose title
B thereto is indefeasible on the basis of s. 340 of the National Land Code 1965 ("s. 340"); and KPDRM's remedy is to recover the balance. Reinco's learned counsel Mr Douglas Yee supported this argument and relied on *Wong Leng Hung v. Krishnamurty Nagaratnam* [2005] 8 CLJ 745 HC.

C **[36]** Mahadaya's alternative contention is that if KPDRM is entitled to terminate SPA1, KPDRM can only forfeit RM140,000 ie, 10% of the purchase price and must refund RM860,000 ie, the balance of the "deposit and part payment", on the strength of
D *Selva Kumar a/l Murugiah v. Thiagarajah a/l Retnasamy* [1995] 2 CLJ 374 FC; and *Johor Coastal Development Sdn Bhd v. Constrajaya Sdn Bhd* [2009] 4 CLJ 569 FC.

[37] KPDRM's learned counsel Mr Nordin Sulaiman (assisted by Ms Nurul Suhada) submitted in essence that the transfer of the
E Land was caused by the fraudulent act of Mahadaya as Mahadaya has breached cl. 2(b) by failing to pay KPDRM the balance, and so under cl. 5(a) to (e), KPDRM has the right to terminate SPA1, and forfeit 50% of the sum of RM1 million. They relied on *inter alia*:

F (1) Section 75 of the Contracts Act 1950 ("s. 75");

(2) *Linggi Plantations Ltd v. Jagatheesan* [1971] 1 LNS 66; [1972] 1 MLJ 89 PC; and

G (3) *Sun Properties Sdn Bhd & Ors v. Happy Shopping Plaza Sdn Bhd* [1987] 2 CLJ 423; [1987] CLJ (Rep) 345 SC.

[38] From the above submissions, the core question for determination by us is:

H
> Given the above salient facts, has KPDRM validly terminated SPA1?

[39] We shall first consider Wong Leng Hung, supra, cited for Reinco. The plaintiff there, a foreigner, ("the purchaser") sought
I specific performance of the sale and purchase agreement in respect of the defendant's ("the vendor's") property in Ampang Jaya,

Selangor which the plaintiff agreed to purchase at RM506,000. The purchaser paid the vendor RM72,000, in addition to a sum of RM400,000 for the redemption of the property charged to the financier. The total amount was more than 90% of the purchase price. The agreement required the purchaser to apply for the approval of the Foreign Investment Committee ("FIC") for the purchase, but did not provide for a completion date and so time was not of the essence thereof. About six months after the execution of the agreement, the vendor purported to terminate the agreement on the ground that the purchaser had failed to expeditiously apply for the FIC approval. The High Court had to decide on the lawfulness or otherwise of the purported termination. Azmel Maamor J (later FCJ) held that the termination was unlawful, and hence granted specific performance.

[40] We pause here to observe that the facts in *Wong Leng Hung, supra,* are readily distinguishable from those in the instant appeals, where time was expressed in cl. 20 to be of the essence of SPA1. In the circumstances, we are unable to see how Mahadaya could garner any support therefrom.

[41] In the instant appeals, the transfer of the land to Mahadaya must first be supported by Mahadaya's performance of its fundamental contractual obligation under cl. 5 to pay the balance, on or before the agreed extension of one month. However, Mahadaya has failed to do so. Clearly, Mahadaya has occasioned a breach of the fundamental term, going to the root of SPA1. Simply put, such a situation surely entitles KPDRM to terminate SPA1. In the circumstances, we are in entire agreement with the learned trial judge in finding that KPDRM had rightfully exercised the right to terminate SPA1 and that such termination was valid. We answer the above core question in the affirmative.

Purported Transfer Of The Land To Mahadaya

[42] Our finding on the valid termination of SPA1 leads us to the consideration of the following consequential question:

> Does the purported transfer of the Land to Mahadaya give Mahadaya an indefeasible title?

[43] The answer to this question would depend on whether Mahadaya is a purchaser in good faith and for valuable consideration. In other words, we have to decide whether the

A transfer is tainted with fraud ie, actual fraud. The existence or absence of fraud is a question of fact to be determined by reference to the facts and circumstances of each particular case. Authorities on the existence or absence of fraud are therefore purely illustrative.

B

[44] In *Aik Ming (M) Sdn Bhd & 8 Ors v. Chang Ching Chuen & 3 Ors & Another Case* [1995] 3 CLJ 639 CA, at p. 679, Gopal Sri Ram JCA (later FCJ) reaffirmed the settled law that one is not a *bona fide* purchaser until one has paid all one's money under the C contract for sale. A person who pays only a deposit and, under the terms of a written or oral contract agrees to pay the balance three months later is not a *bona fide* purchaser: See also *M & J Frozen Food Sdn Bhd & Anor v. Siland Sdn Bhd & Anor* [1994] 2 CLJ 14 per Wan Yahya SCJ; and *Doshi v. Yeoh Tiong Lay* [1974] D 1 LNS 30 per Gill FJ; and the New Zealand case of *Morland v. Hales and Somerville* [1911] 30 NZLR 201.

[45] In *Seah Siang Mong v. Ong Ban Chai & Another Case* [1998] 1 CLJ Supp. 295, 321 f-g, Mohd Ghazali J (now FCJ) followed the above principle enunciated in *Aik Ming (M) Sdn Bhd, supra*. E

[46] The categories of fraud are not closed. Illustrations include:

(1) Effecting a voluntary transfer of land in order to abort the execution proceedings of the judgment creditors: *P.J.T.V. Denson (M) Sdn Bhd & Ors v. Roxy (Malaysia) Sdn Bhd* F [1980] 1 LNS 55 FC per Raja Azlan Shah CJ (M) (now HRH The Sultan of Perak), following Romilly MR in *Green v. Nixon* [1857] 23 Beav 530 & 535, 53 ER 208 and citing *Waimiha Sawmilling Co. Ltd. v Waione Timber Co. Ltd.* [1926] G AC 101 & 106; and

(2) Deliberately and dishonestly registering an interest and then transferring the interest, even before the ink is dry, to another person without the consent of the original registered H proprietor: *Datuk Jagindar Singh & Ors v. Tara Rajaratnam* [1983] 1 LNS 21 FC, per Lee Hun Hoe CJ (Borneo).

[47] We are of the view that Mahadaya's purported transfer of the land to itself in the face of non-payment of the balance is, to say the least, wilful and fraudulent. The transfer was unjustifiable I as Mahadaya was at the material time not entitled to it at all. The object of the transfer was intended to deprive and to cheat

KPDRM of the existing right of ownership. It was therefore tainted with dishonesty or actual fraud. In law, Mahadaya is obviously not a purchaser in good faith and for valuable consideration.

[48] The existence of actual fraud on the part of Mahadaya makes it necessary for us to consider the general provisions of s. 340 and the exceptions thereto which, where relevant, merit reproduction as follows:

> **340. Registration to confer indefeasible title or interest, except in certain circumstances**
>
> (1) The title or interest of any person or body for the time being registered as proprietor of any land, … shall, subject to the following provisions of this section, be indefeasible.
>
> (2) The title … of any such person or body shall not be indefeasible -
>
> (a) in any case of fraud … to which the person or body, or any agent of the person or body, was a party or privy;
>
> (b) …
>
> (c) …
>
> (3) Where the title … of any person or body is defeasible by reason of any of the circumstances specified in sub-section (2) -
>
> (a) it shall be liable to be set aside in the hands of any person or body to whom it may subsequently be transferred; and
>
> (b) any interest subsequently granted thereout shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested:
>
> Provided that nothing in this sub-section shall affect any title … acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser.

[49] The above provisions of s. 340 are clear and unambiguous. As a general rule, s. 340(1) confers indefeasible title on the registered proprietor of any land.

[50] The general rule set out in s. 340(1) is subject to the exceptions enumerated under subsection (2) of which subsection 2(a) is relevant to the instant appeals. Under para (a), such title shall not be indefeasible in the case of fraud to which the person or body, or any agent of the person or body, was a party or privy.

[51] Where the title is defeasible e.g by reason of fraud specified in s. 340(2)(a), it shall be liable to be set aside under s. 340(3).

[52] In the circumstances, Mahadaya's title having been tainted with fraud shall not be indefeasible, and is liable to be set aside under s. 340(3).

[53] Further, Mahadaya has not acquired the title as a purchaser in good faith and for valuable consideration. Hence, the proviso to s. 340(3) is inapplicable.

[54] Our answer to the aforesaid question is in the negative. Mahadaya's title being defeasible is hereby set aside under s. 340(3)(a).

RM1 Million Paid By Mahadaya To KPDRM

[55] Having set aside Mahadaya's title to the land, we must now consider the fate of the RM1 million paid by Mahadaya to KPDRM under SPA1.

[56] At pp. 48 and 49 of the appeal record, the learned trial judge opined that RM140,000 equivalent to 10% of the purchase price of RM1.4 million should be forfeited, but then ordered that "a sum of RM200,000 is reasonable to be forfeited", adding that KPDRM was to refund the balance of RM800,000 to Mahadaya, on the ground that the RM1 million "could not be a true deposit since it amounted to 70% of the purchase price." The finding of the learned trial judge has to be tested by reference to the legal implications of s. 75; and the true construction of cl. 2(a), (b) and cl. 5.

[57] The question that we have to determine is:

> Upon a true construction of cl. 2(a), (b) and cl. 5 and the legal effect of s. 75, is the sum of RM500,000 (being 50% of the RM1 million paid under SPA1) a true deposit?

[58] Clause 2(a) expressly provides that the purchaser (Mahadaya) "covenants and agrees" that Mahadaya "shall pay to the vendor" (KPDRM) "upon execution of this Agreement, the sum of Ringgit Malaysia One Million (RM1,000,000) only now (hereinafter referred to as "the deposit sum") being deposit and part payment towards the purchase price the receipt of which the vendor hereby acknowledges."

[59] Clause 2(a) must be read conjunctively with cl. 2(b) and cl. 5. Under cl. 2(b), in the event of the purchaser's failure and neglect in making payment of the balance, the contracting parties have expressly agreed to allow the vendor to forfeit 50% of the RM1 million absolutely as agreed liquidated damages pursuant to cl. 5(a). Under cl. 5(b), the vendor shall refund the other 50% to the purchase without interest. These clauses must be construed in the light of s. 75 and the judicial pronouncements made thereon.

[60] Section 75 reads:

> **75. Compensation for breach of contract where penalty stipulated for**
>
> When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

[61] An authoritative analysis of s. 75 is available in *Selva Kumar a/l Murugiah, supra*, where the agreement was for the sale and purchase of a medical practice for RM120,000. Clause (15)(b) thereof provides as follows:

> (15)(b) In the event the purchaser shall default in his obligations herein all monies paid to date of such breach shall be forfeited absolutely to the vendor as agreed liquidated damages and thereupon this agreement shall be deemed null and void and the purchaser shall give up vacant possession of the said premises and shall give us (*sic* "up") the said practice to the vendor and shall have not (*sic* "no") further rights whatsoever.

(a) RM12,000 was paid on the signing of the agreement by the purchaser who eventually paid a total sum of RM96,000, leaving an unpaid sum of RM24,000.

(b) The vendor wrote to the purchaser terminating the agreement and forfeiting the sum of RM96,000 as "agreed damages".

(c) In the High Court, the vendor sought and obtained a declaration that the agreement was properly terminated and that he was entitled to the forfeiture sum.

(d) In the appeal to the Federal Court, the issues that arose were:

(i) Whether, in interpreting s. 75, a restricted construction ought to be adopted?

(ii) If so, whether, bearing in mind the forfeiture clause appearing in the contract, and having regard to the true effect of s. 75, it was open in the circumstances for the respondent (vendor) to effectuate the said forfeiture?

(e) Peh Swee Chin FCJ (as he then was), delivering the judgment of the court, held *inter alia* that:

(i) Section 75 ought to be given a restricted construction;

(ii) The evidence showed clearly some actual loss, damages for which could be assessed by settled rules. However, the vendor has brought no evidence to prove damages for the actual loss. Hence, damages had not been proved. The sum of RM96,000 paid towards the purchase price, less RM12,000 ie, 10% deposit paid at the signing of the agreement, was to be refunded to the purchaser.

(iii) The words "whether or not actual damage was proved to have been caused thereby" in s. 75 are limited to those cases where the court would find it difficult to assess damages for the actual damage or loss as distinct from or opposed to all other cases, where a plaintiff in each of them will have to prove damages or the reasonable compensation for the actual damage or loss in the usual ways in accordance with the principles set out in *Hadley v. Baxendale* [1854] 9 Exch 341.

[62] *Selva Kumar, supra*, was subsequently examined in *Johor Coastal Development Sdn Bhd, supra*, where the appellant ("the vendor") and the respondent ("the purchaser") entered into two identical sale and purchase agreements ("the SPA") whereby the purchaser agreed to purchase two properties respectively. The purchase price was to be paid by six instalments. The purchaser made an initial payment of 12%, and then made subsequent payments amounting to 50% of the purchase price. After that, the purchaser defaulted in payments. The vendor terminated the SPA and forfeited all moneys paid pursuant thereto. The purchaser sued the vendor to recover all the moneys paid.

(a) The High Court ordered the vendor to refund all the moneys paid, as actual damage was not proved and so it could not be determined whether the moneys paid was a reasonable compensation as envisaged by s. 75.

(b) The Court of Appeal allowed the vendor's appeal in part by holding that the vendor was entitled to forfeit the initial payment ie, 12% of the purchase price as deposit but must refund the balance, as actual damage was not proved.

(c) The vendor obtained leave to appeal to the Federal Court on questions that raised the following issues which are relevant to the instant appeals:

(i) Whether the forfeiture was lawful in view of s. 75? and

(ii) Whether the Federal Court case of *Selva Kumar, supra*, was good law?

(d) The majority judgment (Arifin Zakaria CJ (M) (now CJ Malaysia); and Alauddin Sheriff PCA (as he then was), Hashim Yusoff FCJ, dissenting, held as follows:

(i) The vendor could not retain the moneys paid, as reasonable compensation, without proof of loss or damage as envisaged by s. 75; and

(ii) *Selva Kumar, supra*, is still good law.

[63] The meaning and purposes of a true deposit had been considered by the Privy Council in *Linggi Plantations, supra*, where in the contract of sale dated 26 May 1962, the vendor agreed to

A sell an estate of 1,488 acres to the purchaser for RM3,775,000. The completion date was on or before 24 August 1962. A 10% deposit of RM377,500 was paid. There was a forfeiture clause should the purchaser fail to complete. The completion did not take place in due time. On 27 August 1962, the vendor gave notice
B that the contract was at an end and purported to forfeit the 10% deposit under cl. 5 thereof.

(a) In the High Court, the purchaser sought a declaration and a return of the 10% deposit. However, Gill J (later CJ (M))
C decided in favour of the vendor's right to forfeit the deposit.

(b) On appeal, the Federal Court reversed the High Court decision.

(c) In the final appeal, the Privy Council restored the High Court
D decision. At p. 93 H-I, the Privy Council held that where the construction of the contract is such that the sum of RM377,500 was paid as a true deposit, it was liable to forfeiture.

E (d) At p. 94, the Privy Council explained that:

(i) A deposit is not merely a part payment but also an earnest to bind the bargain so entered into, and creates by fear of its forfeiture a motive in the payer to perform the rest of
F the contract: *Howe v. Smith* [1884] 27 Ch D 89, 101, per Fry LJ;

(ii) A deposit is a guarantee that the contract shall be performed. If the sale goes on, of course, it goes in part payment of the purchase money for which it is deposited,
G but if on default of the purchaser, ie, if he repudiates, the contract goes off, he can have no right to recover the deposit: per James LJ in *Ex Parte Barrell* L.R 10 Ch 512;

(iii) A deposit serves two purposes:

H

– if the purchase is carried out, it goes against the purchase money; it is a guarantee that the purchaser means business; and

I

– when a man enters into a contract to buy real property without taking the trouble to consider whether he can pay for it or not, then the deposit may be rightly and properly forfeited.

(See *Soper v. Arnold* [1889] 14 App. Case 429, per Lord MacNaghten at p. 435)

[64] An identical issue arose in *Sun Properties Sdn Bhd, supra*. The purchaser entered into a sale agreement with the vendor to purchase all the shares in a company for RM10 million, of which a sum of RM1 million ie, 10% thereof was paid as deposit and towards account of the purchase price. If the purchaser failed to pay any of the instalments under the agreement, the vendor shall be entitled to "forfeit all sums theretofore paid by the purchaser". Time was declared to be of the essence thereof. The purchaser failed to pay the first instalment of RM4 million on the due date. The vendor repudiated the agreement and forfeited the deposit of RM1 million. The purchaser sought a declaration that the forfeiture clause was invalid and unenforceable being in violation of s. 75. The Federal Court held the RM1 million to be a true deposit and was lawfully and properly forfeited by the vendor.

[65] Applying the principles established in *Selva Kumar a/l Murugiah, supra, Johor Coastal Development Sdn Bhd, supra, Linggi Plantations, supra, and Sun Properties, supra*, we hold that the sum of RM500,000 forfeited by KPDRM is not a true deposit. The true deposit should be 10% of the purchase price. That 10% is RM140,000 which should be the forfeiture sum and not RM200,000 as ordered by the learned trial judge. Hence, our answer to the question under this head is in the negative.

Payment Of RM1.8 Million By Reinco To Mahadaya

[66] In view of our finding that SPA1 has been validly terminated and that Mahadaya's title to the land is defeasible and consequently set aside, there can be no sale of the land by Mahadaya to Reinco under SPA2: *Nemo dat quod non habet*. No one (such as Mahadaya) can give that which it has not. In other words, no one (such as Mahadaya) can give a better title than it has. That being the case, what remains to be decided relates to the rights and obligations, if any, of Reinco and Mahadaya under the JVA and the SA.

A **[67]** On this issue, as against KPDRM and Mahadaya, the learned trial judge awarded a sum of RM800,000 as liquidated damages to Reinco.

[68] The facts in these appeals clearly show that the JVA and
B the SA have become impossible of performance or has been otherwise frustrated. In the JVA and the SA, KPDRM was not a party thereto, and there was no privity of contract. No damages can be ordered against KPDRM in this regard.

C **[69]** As the JVA and the SA have become impossible of performance or has been otherwise frustrated, Part VI of the Civil Law Act 1956 (which deals with frustrated contracts), more specifically s. 15(1), applies so that the parties thereto *viz* Mahadaya and Reinco are discharged from further performance of
D the JVA and the SA. Consequently, the sum of RM1.8 million which Reinco has paid to Mahadaya under the JVA shall be dealt with under s. 15(2) thereof and shall be recoverable from Mahadaya at the instance of Reinco as money received by Mahadaya for the use of Reinco by whom the RM1.8 million was
E paid. In the circumstances, instead of the sum of RM800,000 awarded by the High Court, Reinco is entitled to recover the total sum of RM1.8 million, which we hereby order.

Conclusion

F **[70]** On the foregoing grounds, we allow Mahadaya's appeal in Civil Suit S2 in part by varying the forfeiture sum of RM200,000 (from the RM1 million paid pursuant to SPA1) and substituting it with the forfeiture sum of RM140,000 as the true deposit being 10% of the total purchase price of RM1.4 million, and order
G KPDRM to refund the balance of RM860,000 to Mahadaya. By consent, each party is to bear its own costs in this appeal arising from Civil Suit S2.

[71] In Civil Suit S3, we allow Reinco's appeal to the extent that
H the sum of RM800,000 awarded to Reinco is varied to the sum of RM1.8 million, but only against Mahadaya and not against KPDRM.

[72] All the other orders of the High Court (including costs) are hereby affirmed.

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[73] In Civil Suit S3, the parties have agreed that both Reinco and KPDRM shall respectively receive from Mahadaya the sum of RM5,000 as costs.

[74] Deposits in Civil Suit S2 and Civil Suit S3 to be refunded to the respective appellants *viz* Mahadaya and Reinco.